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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity  
Commission,  
Plaintiff,

vs.

Evening Entertainment Group, LLC  
d/b/a Sandbar Mexican Grill,  
Defendant.

Case 2:11-cv-01870-FJM

**MOTION TO QUASH AND/OR  
MOTION FOR PROTECTIVE ORDER**

This discovery dispute arises in a pregnancy discrimination case brought under Title VII on behalf of Keli Kozup, a bartender, who, the EEOC alleges, was removed from the bartending schedule on Sundays because she was pregnant.

The EEOC moves to quash and/or seeks a protective order<sup>1</sup> to prohibit Defendant from obtaining records from three of Ms. Kozup's former employers in a situation nearly identical to the situation addressed by this Court in *Lewin v. Nackard Bottling Co.*, No.

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<sup>1</sup> The parties were unable to resolve this discovery dispute after personal consultation and sincere effort pursuant to Local Rule 7.2(j) which involved both written correspondence and a phone call.

CV 10-8041-PCT-FJM, 2010 WL 4607402 (D. Ariz. 2010) (quashing overbroad subpoenas for personnel files of former employers where subpoenas not reasonably calculated to lead to the discovery of admissible evidence, and likely an impermissible use of propensity evidence).

On May 3, 2012 Defendant subpoenaed three of Ms. Kozup's former employers seeking Ms. Kozup's entire personnel file "and other records referencing or relating to" Ms. Kozup's employment:

Please produce any and all personnel files and other records referencing or relating to the employment or engagement of, or any services provided by, **Keli C. Kozup (f/k/a Keli Mulholland** [personal identifying information redacted] including but not limited to [six categories of information]. See Exhibit 1.

The EEOC moves to quash the subpoenas pursuant to Rule 45(c)(3)<sup>2</sup> and seeks a protective order pursuant to 26(c)(1).<sup>3</sup> First, Sandbar's subpoenas are overbroad on their face because Sandbar seeks all Ms. Kozup's employment records, including some records while she was a minor. Second, records from Ms. Kozup's former employers are not reasonably calculated to lead to the discovery of admissible evidence: (1) Ms. Kozup's job performance is not at issue since Ms. Kozup had no performance warnings, discipline, or poor performance reviews in her Sandbar personnel file; (2) the EEOC is

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<sup>2</sup> The EEOC has standing to challenge the subpoenas because Ms. Kozup has a right to protect the disclosure of her personnel files. *Richards v. Convergys Corp.*, Nos. 2:05-CV-00790-DAK, 2:05-CV-00812 DAK, 2007 WL 474012, at \*1 (D.Utah 2007) (holding that "[t]he court agrees with the reasoning of the courts that have found that a party has a personal right in his employment records sufficient to confer standing.").

<sup>3</sup> The scope of permissible discovery of Rule 45 is the same as Rule 26. *Stewart v. Mitchell Transport*, No. 01-2546-JWL, 2002 WL 1558210, at \*3 (D.Kan. 2002) ("It is well settled, however, that the scope of discovery under a subpoena is the same as the scope of discovery under Rules 26(b) and 34.").

1 not seeking backpay following her employment at Sandbar; (3) Sandbar has not asserted  
2 any basis that Ms. Kozup misrepresented<sup>4</sup> anything regarding her prior employment; and  
3 (4) Sandbar has not alleged that Ms. Kozup engaged in any wrongful conduct that would  
4 have led to her discharge.  
5

6 The EEOC respectfully requests that Sandbar's overbroad subpoenas be quashed  
7 as an improper fishing expedition.  
8

9 DATED this 9th day of May 2012.  
10

11  
12 MARY JO O'NEILL  
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14 SALLY C. SHANLEY  
15 Supervisory Trial Attorney

16 /s/ Christopher R. Houk  
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25

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27 <sup>4</sup> Sandbar may argue that somehow Ms. Kozup "misrepresented" facts on her Sandbar  
28 employment application by leaving blank a reason for leaving one of her prior employers.  
A blank response is not a misrepresentation and could have be followed up on in an  
interview.

**CERTIFICATE OF SERVICE**

I certify that on this 9th day of May, 2012, the foregoing document was via  
electronic mail to:

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